Nos. 12-35307, 12-35325

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN M. FLOYD & ASSOCIATES, INC.,
a Texas corporation,
Appellant/Cross-Appellee,

v.

TAPCO CREDIT UNION,
Appellee/Cross-Appellant.

Appeal from the United States District Court
for the Western District of Washington
The Honorable Benjamin H. Settle
District Court Docket Number: 3:10-cv-05946-BHS

APPELLEE'S PRINCIPAL AND RESPONSE BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Table of Cases **Page**

Court Rules

Federal Statutes

Other

I. CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, appellee/cross-appellant TAPCO Credit Union states that it has no parent corporations, and no publicly held corporations own 10% or more of TAPCO Credit Union's stock.

II. JURISDICTION

A. The U.S. District Court for the Western District of Washington at Tacoma had jurisdiction of this case pursuant to 28 U.S.C. § 1332(a) because this case is a civil action where the matter in controversy exceeds the sum or value of $75,000 and is between citizens of different States. Appellant / Cross-Appellee John M. Floyd & Associates, Inc. ("**Floyd**") is domiciled in Texas while Appellee/Cross-Appellant TAPCO Credit Union ("**TAPCO**") is domiciled in Washington.

B. Floyd has appealed the district court's order granting TAPCO's motion for summary judgment, the final judgment entered in favor of TAPCO, and the order denying Floyd's motion to alter or amend the judgment or for reconsideration. TAPCO has filed a cross-appeal of the order granting TAPCO's motion for summary judgment. This Court has jurisdiction over this appeal and cross-appeal pursuant to 28 U.S.C. § 1291.

C. The U.S. District Court for the Western District of Washington at Tacoma entered the order granting TAPCO's motion for summary judgment on February 8, 2012 and then a final judgment in favor of TAPCO on February 9, 2012. The district court entered the order denying Floyd's motion to alter or amend the judgment or for reconsideration on March 21, 2012. Floyd filed its notice of appeal on April 18, 2012, and TAPCO filed its notice of cross-appeal on

April 24, 2012. TAPCO's notice of cross-appeal was timely under Fed. R. App. P. 4(a)(3) because the notice of cross-appeal was filed within 14 days after the filing of Floyd's notice of appeal.

III. STATEMENT OF THE ISSUES

A. Whether the district court erred by granting TAPCO's motion for summary judgment, thereby dismissing Floyd's claims arising from the parties' contract, when (1) Floyd failed to dispute that TAPCO's payment of $147,583.05 to Floyd did not constitute full payment for Floyd's recommendations, services, and/or products during the term of the parties' contract; (2) the district court ruled the declarations Floyd submitted in opposition to TAPCO's motion for summary judgment warrant scrutiny for containing statements that arguably lack foundation; (3) Floyd failed to put forth significant and probative evidence to support its claim that TAPCO utilized or agreed to utilize any of Floyd's recommendations, services, and/or products after the contract terminated; and (4) Floyd refused to conduct discovery in order to support its claims with significant and probative evidence. Answer: ***No.***

B. Whether the district court erred when it failed to conclude the parties' contract is fully integrated or partially integrated when (1) the parties executed the contract on or about May 27, 2004; (2) the contract is the only written agreement between the parties; (3) the contract describes the relationship between the parties

during the term of the contract and the method by which TAPCO is to pay Floyd; (4) the contract provides for a "three year engagement" with 36 billing months, which term the parties initialed by hand; (5) the contract states fees to Floyd will commence not less than sixty (60) days following the installation of the recommendations and will continue throughout the contracted engagement period; and (6) the contract provides recommendations installed or approved after 24 months of the initial engagement will not be included in the fee calculation. Answer: ***Yes.***

C. Whether the district court abused its discretion by denying Floyd's motion to alter or amend judgment or for reconsideration when (1) Floyd failed to present new facts or legal authority in support of its motion which could not have been brought to the court's attention earlier with reasonable diligence; and (2) Floyd failed to address why it did not accept TAPCO's invitation to inspect its computer system in order to prove that TAPCO did not use Floyd's programs after the parties' contract terminated. Answer: ***No.***

IV. STATEMENT OF THE CASE

In May 2004, Floyd and TAPCO entered into a written contract (the "**Contract**") whereby Floyd agreed to provide TAPCO with an overdraft protection program so that TAPCO could provide its members with enhanced overdraft protection privileges. TAPCO paid Floyd a total of $147,583.05

pursuant to this Contract, which TAPCO terminated on December 31, 2007. Although TAPCO maintains it properly terminated this Contract, and that it does not owe Floyd any additional money under the contract, Floyd disagrees.

In August 2009, Floyd filed suit against TAPCO in U.S. District Court for the Western District of Washington at Tacoma and alleged that TAPCO owed Floyd money under the Contract. This action was dismissed without prejudice in June 2010. In December 2010, Floyd filed a second action against TAPCO in the same district in an effort to recover money from TAPCO based on the parties' Contract.

The district court granted TAPCO's motion for summary judgment and dismissed Floyd's claims for breach of contract, *quantum meruit*, breach of the implied covenant of good faith and fair dealing, and for an accounting by virtue of an order entered on February 8, 2012 and a judgment entered on February 9, 2012. In doing so, the district court noted that the declarations Floyd filed in opposition to TAPCO's motion for summary judgment warrant scrutiny for containing statements that arguably lack foundation, and that Floyd failed to obtain in discovery significant and probative evidence in support of its claims despite TAPCO's invitation to Floyd to inspect TAPCO's computer system.

Although the district court disagreed with TAPCO's assertion that the Contract is either fully integrated or partially integrated, it nevertheless granted

TAPCO's motion for summary judgment and dismissed Floyd's claims on the grounds that Floyd failed to introduce significant and probative evidence to support its claims that TAPCO had used Floyd's products or recommendations, including its proprietary overdraft protection software program (the "**ODP**"), after the Contract terminated. Floyd subsequently filed a motion to alter or amend judgment or, alternatively, a motion for reconsideration, which the district court denied on March 21, 2012. Floyd then filed its notice of appeal on April 18, 2012, and TAPCO filed its notice of cross-appeal on April 24, 2012.

The main issues on appeal are whether the district court erred by granting TAPCO's motion for summary judgment and whether the district court erred by denying Floyd's motion to alter or amend judgment or, in the alternative, motion for reconsideration. The main issue on cross-appeal is whether the district court erred when it failed to rule that the Contract is fully integrated or partially integrated.

V. STATEMENT OF FACTS

A. The Parties' History And The Contract Between Them

Appellant / Cross-Appellee John M. Floyd & Associates ("**Floyd**") is a Texas-based consulting company that provides overdraft protection software and software training to credit unions across the country. Floyd's Excerpts of Record ("**R.E.**") 137. In May 2004, TAPCO hired Floyd to install Floyd's Overdraft

Privilege Program software program (the "**ODP**") in TAPCO's computer system. R.E.137. The parties memorialized their agreement concerning the terms and conditions upon which TAPCO could use the ODP in a written contract dated May 5, 2004 (the "**Contract**"). R.E.137. Floyd drafted the Contract and provided it to TAPCO. R.E.137. A copy of the Contract is located at R.E.142-149 and can also be found in the Appendix to this brief.

On appeal, Floyd has erroneously stated "TAPCO did not have *any* overdraft program in effect before entering into the [C]ontract with [Floyd]." [1] In support of this proposition, Floyd cites to R.E.91, 100, which provide in relevant part that according to Floyd, "TAPCO had *virtually no* overdraft privilege programs to speak of before contracting with FLOYD." The fact is TAPCO had an overdraft protection program in place well before Floyd came along, and Floyd did not give TAPCO the idea to offer overdraft protection to its members. R.E.45, 47, 49, 91, 100.

Mr. John M. Floyd, Floyd's Chairman, executed the Contract on behalf of Floyd on or about May 29, 2004. R.E.138. Mr. John Bechtholt, the former Chief Executive Officer of TAPCO, executed the Contract on behalf of TAPCO on May 27, 2004. R.E.138. The Contract memorializes the full and complete agreement between Floyd and TAPCO concerning the goods and services Floyd agreed to

[1] Brief for Appellant at 10 (emphasis added).

provide to TAPCO. R.E.138.

On June 18, 2004, Mr. Floyd wrote to Mr. Bechtholt and provided him with an executed copy of the original signed Contract. R.E.138. At that time, Mr. Floyd informed TAPCO that Floyd had arranged for training on August 23, 2004 concerning TAPCO's use of the ODP. A copy of Mr. Floyd's June 18, 2004 letter to TAPCO is located at R.E.151.

Page 1 of the Contract provides this agreement "shall become the Agreement between John M. Floyd & Associates, Inc. and TAPCO Credit Union" upon acceptance by TAPCO. R.E.138. TAPCO accepted the Contract on May 27, 2004 when its Chief Executive Officer executed this writing. R.E.138. *Floyd admitted to TAPCO in discovery during the first lawsuit between the parties that the Contract is the only written agreement between the parties.* R.E.138.

The "Overdraft Privilege Program" paragraph of the Contract on page 2 describes the consulting and training services Floyd agreed to provide TAPCO in connection with Floyd's installation of the ODP in TAPCO's operating system. R.E.138.

The "Conduct of the Engagement" paragraph of the Contract on page 2 states the "initial engagement will require approximately six to eight calendar weeks to complete, with follow-up lasting for the contracted engagement period." R.E.138. Floyd provided installation, training, and consulting services to TAPCO

during this initial engagement period. R.E.138. *This "initial engagement" was completed no later than August 31, 2004,* by which time the installation of the ODP in TAPCO's operating system had been completed and Floyd had completed its training of TAPCO's employees with regard to their operation and use of this software. R.E.138.

The paragraph of the Contract entitled "Cost of the Engagement" on page 3 contains a three year engagement comprised of 36 billing months. R.E.138-39. Messrs. Floyd and Bechtholt both initialed the box entitled "Billing Initial" in this paragraph, which is next to the box entitled "Billing Months." R.E.139. The Cost of the Engagement paragraph further provides that "[f]ees to [Floyd] will commence not less than sixty (60) days following the first full month after the installation of recommendations and will continue throughout the contracted engagement period." R.E.139.

The "Quantification of Earnings" paragraph of the Contract on pages 3 and 4 sets forth the formula by which TAPCO was to pay Floyd under the Contract. R.E.139. This paragraph provides that "[i]f a recommendation [made by Floyd] is not approved [by TAPCO] it will not be included in the fee calculation. However, if any recommendation, *within 24 months of the initial engagement,* is installed or approved or approved as modified … it will be included in the fee calculation." R.E.139 (emphasis added).

In sum, pages 3 and 4 of the Contract contain the formula by which TAPCO was to pay Floyd for TAPCO's use of the ODP. R.E.139. This portion of the Contract further provides that in the event TAPCO approved any recommendations Floyd made concerning TAPCO's use of *other* products or systems Floyd offered in addition to the ODP, TAPCO would have to pay for such products or systems only if the recommendation was approved within 24 months of the initial engagement. R.E.139.

Other than TAPCO's use of the ODP, TAPCO did not approve or implement any recommendation made by Floyd prior to December 31, 2007, the date the Contract ended. R.E.139. Hence, other than the ODP, TAPCO did not approve or implement any recommendation made by Floyd within 24 months of the parties' initial engagement, which terminated no later than August 31, 2004. R.E.139. Although Floyd offered other software programs to TAPCO within 24 months of the parties' initial engagement, which Floyd has referred to as "e-channels," TAPCO never used any of these other programs. R.E.139. TAPCO did not use these other programs because they were not able to run on TAPCO's main operating system, Windows XP. R.E.139-40. Thus, ODP is the only software program or recommendation of Floyd's that TAPCO ever used. R.E.140.

TAPCO paid Floyd a total of $147,583.05 for TAPCO's use of the ODP in accordance with pages 3 and 4 of the Contract. R.E.140. This is the entire sum

that Floyd was entitled to receive from TAPCO under the Contract. R.E.140. Floyd never informed TAPCO that Floyd believed TAPCO should have paid it more money for TAPCO's use of the ODP for the period ending December 31, 2007. R.E.140. TAPCO paid this money to Floyd by way of regular installment payments that Floyd apparently received from June 23, 2004 to January 23, 2008. R.E.140.

During the term of the Contract, Floyd regularly sent one of its employees (Eric) to TAPCO in order to audit TAPCO's records. R.E.140. This was done to ensure that TAPCO was correctly reporting its revenue to Floyd and paying Floyd in accordance with the Contract. R.E.140.

On October 23, 2007 counsel for TAPCO, Mark J. Giske, formally notified Floyd in writing that the Contract between the parties expired on December 31, 2007 pursuant to its terms and that TAPCO did not intend to extend the Contract past that date. R.E.152.

Counsel for Floyd, Robert S. Pickelner of Bellaire, Texas responded to Mr. Giske's letter of October 23, 2007 by way of a letter dated November 29, 2007. R.E.152-53. This letter reflects Floyd's mistaken belief that TAPCO intended to utilize certain of Floyd's e-channels in addition to the ODP program after January 1, 2008. R.E.153.

Counsel for TAPCO responded to Mr. Pickelner's letter of November 29,

2007 by way of a letter dated December 12, 2007. R.E. 159. This letter reflects the fact that TAPCO was not using any of Floyd's products as of December 12, 2007. R.E. 159.

On appeal, Floyd contends the letter from Mr. Giske to Mr. Pickelner dated December 12, 2007 reflected "TAPCO would not be returning any software or other materials to [Floyd] as TAPCO had previously promised." [2] However, Mr. Giske's letter of December 12, 2007 makes it quite clear that TAPCO did not *have* any such items; that is why no such items were going to be returned to Floyd. R.E.159.

Counsel for TAPCO subsequently sent Mr. Pickelner a follow-up letter on December 26, 2007. R.E.161. This letter reflects TAPCO's position that the Contract terminated at the end of 2007 by its terms. R.E.153.

On August 5, 2009 Floyd filed suit against TAPCO in the case entitled *John M. Floyd & Associates, Inc. v. TAPCO Credit Union*, United States District Court for the Western District of Washington at Tacoma Cause Number 3:09-cv-05480-KLS (the "**First Action**"). R.E.162. In the First Action Floyd took the position that TAPCO still owes Floyd money under the Contract. R.E.162. TAPCO denied this was the case. R.E.162. In the First Action Floyd asserted claims against TAPCO for breach of contract, *quantum meruit*, and breach of the implied

[2] Brief for Appellant at 10.

covenant of good faith and fair dealing. R.E.162. All of Floyd's claims in the First Action arose from the Contract. R.E.162.

Floyd produced its History Notes Reports in discovery in the First Action, which come from Floyd's contact management software. R.E.107. According to these History Notes Reports, representatives of the parties conferred about the Contract on several dates in late 2007, including October 5, 2007 and October 13, 2007. R.E.107. A copy of part of these History Notes Reports is located at R.E.210-217.

According to the History Notes Report comment for September 6, 2007, on that date, Mr. Ray Keel, who apparently is (or was) one of Floyd's employees, had "[a] few conversations with Lori [at TAPCO] about NII, Echannels and extension [of the Contract] in Dec…" R.E.210.

The History Notes Report comment for October 5, 2007, which was also apparently entered by Mr. Keel states "We don't think it is a good idea to have them [TAPCO] sign an addendum as this may give the impression that they have some negotiating power … they of course are still bound by the contract to pay at the original base [rate] … " R.E.210. *This journal entry and the preceding journal entry suggest that Floyd knew the Contract expired at the end of 2007, and that TAPCO would have to execute an "addendum" if the Contract was to be extended into 2008. See* R.E.210.

Floyd's History Notes Report comment for October 8, 2009 states it is "not worth trying to mend fences, this account is being sued by JMFA." R.E.212.

The History Notes Report comment for October 13, 2007, which was also apparently made by Mr. Keel states "*The origianal* [*sic*] *contract expires at the end of the year* and [TAPCO C.E.O. John Bechtholt] said he agrees that he would owe us for any revenue up until then but nothing afterwards,,, [*sic*] His argument was that Xp has been unable to provide them with echannel access and that was the only reason *why it was not turned on*… also he sees the contract language of initial engagement as our original onsite visit and that two year time frame has expired…" (Emphasis added). R.E. 217. This comment for October 13, 2007 reflects Floyd knew that TAPCO had not turned on Floyd's e-channels.

The History Notes Report comments for November 20, 2007 state "October Status – Client [TAPCO] has us going through attorney for any contact as they do not want to pay JMFA [Floyd] for the echannel income past the 12-31-07 end of contract." R.E.213.

The History Notes Report comment for January 22, 2008 states "December Status – This would be our normal last month of tracking. Currently in dispute on E-channel income and in the attorney's hands for resolution. This is the last month of regular tracking." R.E.212.

In sum, the History Notes Reports, which come from Floyd's own computer

system, demonstrate Floyd knew the Contract expired at the end of 2007 and that the only product of Floyd's that TAPCO ever used was the ODP, for which it paid Floyd. The History Notes Reports do not contain any evidence that states or suggests the parties agreed that TAPCO approved or implemented any other programs, products, or recommendations of Floyd other than the ODP.

The First Action was dismissed without prejudice on June 11, 2010. R.E.163. Floyd filed the instant case on December 29, 2010. R.E.163. Floyd's substantive claims for damages herein all arise from the Contract, and they are the same damage claims that Floyd asserted in the First Action. R.E.163.

Prior to filing this lawsuit, Floyd never requested or demanded an accounting from TAPCO. R.E.140. The first that TAPCO ever heard of Floyd's professed desire for an accounting came when TAPCO was served with Floyd's Complaint that was filed in this case, which is the second lawsuit that Floyd has filed against TAPCO based on the Contract. R.E.140.

Scott Drabb is TAPCO's Chief Financial Officer. R.E.47. During his deposition on October 14, 2011, after TAPCO produced numerous documents to Floyd in discovery, and in response to Floyd's counsel's repeated inquiries on the subject, Mr. Drabb told Floyd's counsel that TAPCO would make *all* of the information in its computer system accessible to Floyd. R.E.47. This was done in order to prove to Floyd once and for all that (a) TAPCO has not been using Floyd's

ODP or any other programs that were covered by the Contract since the Contract terminated on December 31, 2007; and (b) the declarations that TAPCO filed in the First Action and in this proceeding are entirely true, correct, and accurate. R.E.47-48.

Counsel for Floyd followed up with counsel for TAPCO via email on October 18, 2011 and stated "I am writing to coordinate a time for my client's representatives to have … onsite access to inspect your client's computer and/or core processor systems. Please let me know what dates and times work for your client." R.E.53. Counsel for TAPCO responded via email on this same day and communicated that Floyd could have access to TAPCO's computer system so long as a protective order was in place. R.E.53. TAPCO's attorney also asked in this email if Floyd's attorney was available the following day to discuss the furnishing of access to TAPCO's computer system. R.E.53.

For some reason, Floyd decided not to take TAPCO up on its offer. R.E.48. Hence, Floyd did not view or access any of the information stored in TAPCO's computer system in response to TAPCO's invitation for Floyd to do so. R.E.48. *Thus, no agent, employee, or representative of Floyd's has viewed any of the information stored in TAPCO's computer system or in TAPCO's facilities since the parties' Contract terminated on December 31, 2007.* R.E.48 (emphasis added).

After TAPCO agreed to make its computer system available to Floyd,

TAPCO's attorney sent numerous emails to Floyd's counsel concerning the scheduling of access to TAPCO's records and a proposed stipulated protective order concerning such. R.E.50. TAPCO's attorney never received a response, written or otherwise, in response to these emails. R.E.51. Thus, Floyd never conducted an onsite inspection of TAPCO's computer system or records in connection with this lawsuit. R.E.51.

Given that no agent, employee, or representative of Floyd's has viewed any of the information stored in TAPCO's computer system or in TAPCO's facilities since the parties' Contract terminated on December 31, 2007, and considering that Floyd failed to produce to the district court even one (1) shred of evidence to the effect that TAPCO has used or agreed to use Floyd's ODP or related products and/or services since the Contract terminated, TAPCO questioned below how Floyd could supply to the district court declarations from two of Floyd's employees that stated "[f]rom December 31, 2007 to date, TAPCO has been using FLOYD's proprietary ODP recommendations, products and/or services[.]" R.E.48. As seen below, the district court seemed to agree that Floyd's summary judgment declarations were made without a sufficient lack of personal knowledge and without a proper foundation, and the district court weighed these declarations accordingly. R.E.13.

B. The District Court's Rulings

In ruling on TAPCO's motion for summary judgment, the district court noted that Floyd did not dispute that it received the $147,583.05 that TAPCO paid under the Contract, nor did Floyd claim that this amount did not constitute full payment for Floyd's recommendations, services, and/or products pre-December 31, 2007. R.E.11. The district court also recognized Floyd's claims concerned its alleged right to payment from TAPCO's purported increased non-interest income from December 31, 2007 to present. R.E.11. A copy of the district's court ruling on TAPCO's motion for summary judgment may be found in the Appendix to this brief.

The district court rejected TAPCO's assertion that the Contract was completely integrated or partially integrated and concluded the Contract is ambiguous with respect to several terms "crucial to the resolution of the allegations contained in the complaint." R.E.14. However, the district court agreed with TAPCO that "Floyd has not provided any probative evidence to support its underlying claim that TAPCO used its recommendations, products, and/or services post-December 31, 2007" and that "[a]bsent this evidence, the Court finds that trial is not necessary." R.E.14.

In reaching this result, the district court acknowledged Floyd's summary judgment declarations warrant scrutiny for containing statements that arguably lack

foundation because they were not based on the declarants' personal knowledge. *See* R.E. 13, 40, 41. The district court noted that "TAPCO afforded Floyd ample opportunity to produce that evidence [it needed to withstand TAPCO's motion for summary judgment], including an invitation to review its computer records for information relating to TAPCO's purported use and reliance upon Floyd's proprietary recommendations post-December 31, 2007. Rather than accept that invitation or otherwise assemble specific probative evidence, Floyd continues to rely in its response on an unsubstantiated allegation regarding its 'belie[f] that TAPCO has generated in excess of $1,000,000 in additional non-interest income' post December 31, 2007. A 'belief' that TAPCO increased its earnings – and that those earnings resulted from TAPCO's improper use of Floyd's recommendations – is not evidence." R.E.14, 15.

After it found that Floyd had failed to introduce "significant and probative evidence" in support of its claims, the district court dismissed Floyd's claims pursuant to *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). R.E.15.

Floyd subsequently filed its motion to alter or amend judgment or in the alternative motion for reconsideration of judgment, which the district court denied because, among other things, (1) Floyd failed to present new facts or legal authority in support of its motion which could not have been brought to the court's

attention earlier with reasonable diligence; and (2) Floyd failed to address why it did not accept TAPCO's invitation to inspect its computer system in order to prove that TAPCO did not use Floyd's programs after the parties' contract terminated. R.E.2, 4. A copy of the district's ruling on Floyd's motion to alter or amend judgment or in the alternative motion for reconsideration of judgment may be found in the Appendix to this brief.

VI. STANDARD OF REVIEW

The standard of review on appeal is *de novo* with respect to the district court's grant of summary judgment, in which case the facts are construed in the light most favorable to the nonmoving party and all reasonable inferences are drawn in that party's favor. *E.g.*, *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108 (9th Cir. 2011). In reviewing the district court's grant of summary judgment, the Court of Appeals considers whether a genuine issue of material fact exists and whether the district court correctly applied the relevant substantive law. *Id.* (citing *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1167-68 (9th Cir. 2007)).

The denial of a motion to alter or amend a judgment is reviewed for abuse of discretion. *Duarte v. Bardales*, 526 F.3d 563 (9th Cir. 2008) (citing *Pasatiempo v. Aizawa*, 103 F.3d 796, 801 (9th Cir. 1996)). A district court abuses its discretion only if the district court applied an incorrect legal rule in view of the relief requested or made a factual finding that was "illogical, implausible, or without

support in inferences that may be drawn from the record." *Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (9th Cir. 2012) (citing *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009)).

VII. SUMMARY OF ARGUMENT

The district court did not err by granting TAPCO's motion for summary judgment and dismissing Floyd's claims, and the district court correctly held that TAPCO paid Floyd everything that Floyd was entitled to receive from TAPCO before the Contract terminated. The district court was also correct when it determined Floyd failed to provide significant and probative evidence to support its underlying claim that TAPCO used its recommendations, products, and/or services after the parties' Contract terminated on December 31, 2007. The district court was also correct to realize Floyd's summary judgment declarations were lacking in foundation because they were not based on the declarants' personal knowledge, and Floyd chose not to utilize the discovery process or accept TAPCO's invitation to inspect its computer system in order to assemble significant and probative evidence to support its claims.

Although it properly dismissed Floyd's claims on summary judgment, the district court erred by finding that the Contract is ambiguous and that the Contract is neither fully integrated nor partially integrated. Thus, even if this Court was to conclude Floyd produced sufficient evidence to withstand TAPCO's motion for

summary judgment due to the existence of a genuine issue of material fact, the dismissal of Floyd's claims should nevertheless be affirmed because applicable Washington law prevents Floyd from introducing extrinsic evidence that modifies or contradicts the written Contract's three (3) year term and its provision to the effect that TAPCO does not have to pay Floyd for any approved "recommendation" Floyd made after two (2) years from the parties' initial engagement. It was undisputed below that this initial engagement ended no later than August 31, 2004.

Finally, the district court did not abuse its discretion when it denied Floyd's motion to alter or amend judgment or, in the alternative, motion for reconsideration. The fact is Floyd failed to present new facts or legal authority in support of this motion which could not have been brought to the court's attention earlier with reasonable diligence, and Floyd failed to address why it did not accept TAPCO's invitation to inspect its computer system in order to prove that TAPCO did or did not use Floyd's programs after the Contract terminated.

VIII. ARGUMENT

A. The District Court Should Have Held That The Contract Was Completely Integrated Or, At The Very Least, Partially Integrated.

In Washington, neither parol nor extrinsic evidence that contradicts or varies the terms of an integrated written contract is admissible. *E.g.*, *Berg v. Hudesman,*

801 P.2d 222 (Wash. 1990). Integrated contracts are contracts that are intended to be a final expression of the parties' agreement. *See Berg*, 801 P.2d 222; *see also John M. Floyd & Associates, Inc. v. First Florida Credit Union*, 443 Fed. Appx. 396 (11th Cir. 2011) (affirming summary judgment dismissal of Floyd's breach of contract claim against credit union arising from parties' consulting agreement for overdraft fee program); *John M. Floyd & Associates, Inc. v. Star Financial Bank*, 489 F.3d 852 (7th Cir. 2007) (affirming summary judgment dismissal of Floyd's breach of contract claim against bank arising from parties' consulting agreement).

In making this preliminary determination of whether the parties intended the written document to be an integration of their agreement, the trial court must hear all relevant, extrinsic evidence, oral or written; if after hearing all of the evidence the court determines that the writing is the final and complete expression of the parties' agreement — *i.e.*, completely integrated — then the extrinsic evidence will be disregarded. 5C Washington Practice, Evidence Law and Practice § 1200.9 (5th ed. 2009) (citing *Emrich v. Connell*, 716 P.2d 863 (Wash. 1986) (*en banc*)).

In this case, the paragraph of the Contract entitled "Cost of the Engagement" on page 3 contains a three year engagement period comprised of 36 billing months. R.E.122. On behalf of the parties herein, John Floyd and John Bechtholt both initialed the box entitled "Billing Initial" in this paragraph, which is next to the box entitled "Billing Months." R.E.122. The Cost of the Engagement paragraph

further provides that "[f]ees to [Floyd] will commence not less than sixty (60) days following the first full month after the installation of recommendations and will continue throughout the contracted engagement period." R.E.122. TAPCO submitted evidence to the district court that the initial engagement ended no later than August 31, 2004, and Floyd failed to produce any evidence to the contrary. R.E.121.

The "Quantification of Earnings" paragraph of the Contract on pages 3 and 4 sets forth the formula by which TAPCO was to pay Floyd under the Contract. R.E.122. This paragraph provides that "[i]f a recommendation [made by Floyd] is not approved [by TAPCO] it will not be included in the fee calculation. However, if any recommendation, within 24 months of the initial engagement, is installed or approved or approved as modified … it will be included in the fee calculation." R.E.122.

In sum, pages 3 and 4 of the Contract contain the formula by which TAPCO was to pay Floyd for TAPCO's use of the ODP. R.E.122. This portion of the Contract further provides that in the event TAPCO approved any recommendations Floyd made concerning TAPCO's use of *other* products or systems Floyd offered in addition to the ODP, TAPCO would have to pay for such products or systems if the recommendation was approved within 24 months of the initial engagement. R.E.122.

The record that was before the district court reflects the Contract fully describes the relationship between the parties and sets forth the formula by which TAPCO agreed to pay Floyd for TAPCO's use of the ODP. Floyd admitted in discovery that the Contract was the only written contract between the parties. The Contract obviously represents the final expression of the parties' agreement. As such, the district court should have held that the Contract is completely integrated. Had it done so, Floyd would have been barred from introducing extrinsic evidence to the effect that the Contract term or 36 month billing term lasted past December 31, 2007 or that the Contract was modified as to its term or billing term. Floyd would also be prohibited from introducing extrinsic evidence that contracted the written term that provides TAPCO does not have to pay Floyd for any approved "recommendations" Floyd made after 24 months of the initial engagement.

If nothing else, the district court should have concluded the Contract is partially integrated. When a contract is only partially integrated, the parol evidence rule applies to those terms which constitute a final expression of the parties' agreement, but the rule does not apply to the terms not included in the writing. *Emrich*, 716 P.2d 863. The open terms may be proved by extrinsic evidence provided that the additional terms are not inconsistent with the written terms. *Id.*

Had the district court determined that the Contract is only partially

integrated, this would have served as an alternative basis for dismissing Floyd's claims on summary judgment. This is because Floyd would not have been permitted to try to prove any alleged "open terms" by extrinsic evidence to the extent they conflicted with the Contract's written terms. Floyd's case below rested entirely on non-existent "open terms." Thus, if the Contract was held to be partially integrated, Floyd would have been barred from introducing extrinsic evidence to the effect that the Contract lasted longer than three years with 36 billing months. Floyd would have been similarly barred from submitting extrinsic evidence to the effect that TAPCO had to pay Floyd for any of Floyd's products or recommendations if TAPCO used or implemented them more than 24 months after the initial engagement. Hence, had the district court held that the Contract was only partially integrated, the Contract's three year term — and its provision to the effect that TAPCO does not have to pay Floyd for any approved "recommendations" Floyd made after 24 months of the initial engagement — would have to hold up, notwithstanding any "significant and probative" extrinsic evidence to the contrary that Floyd might have conjured up.

Thus, the district court should have also dismissed Floyd's claims based on the three year term of the Contract. Given the "Three Year Engagement" referenced on Page 3 of the Contract, which both parties initialed and agreed to, Floyd could not properly submit any extrinsic evidence to the effect that the

Contract term lasted past December 31, 2007, for such evidence would impermissibly conflict with the three year term set forth in the Contract itself. *See, e.g.*, *Emrich*, 716 P.2d 863.

The record before the district court also reflects Floyd's own History Notes Reports from its contact management software system show Floyd *knew* that the Contract expired at the end of 2007; this is why Floyd did not "think it is a good idea to have them [TAPCO] sign an addendum as this may give the impression that they have some negotiating power," as "*the origianal* [sic] *contract expires at the end of the year[.]"* (Emphasis added). The record before the district court also reflected that TAPCO had its own overdraft protection program in place well before Floyd ever came along, and that Floyd did not give TAPCO the idea of generating revenue by providing its members with overdraft protection.

Thus, even if Floyd had submitted to the district court significant and probative extrinsic evidence to the effect that TAPCO is liable to Floyd for any ODP charges incurred after the Contract terminated on December 31, 2007 or evidence to the effect that TAPCO agreed to implement or implemented any other Floyd recommendation, the district court would have still been required to exclude this evidence had it concluded the Contract is only partially integrated. In sum, the district court should have determined, if nothing else, that the Contract is partially integrated for the reasons set forth above.

B. The District Court Properly Dismissed Floyd's Claims On Summary Judgment Due To Floyd's Failure To Provide Significant And Probative Evidence In Support Of Its Claims.

In light of the evidence that TAPCO furnished with its motion for summary judgment and the deserved scrutiny the district court gave to Floyd's opposing declarations, which lacked foundation and were not based on personal knowledge, the district court rightly held that Floyd failed to produce significant and probative evidence in support of its claims. The district court was also right to question why Floyd failed to accept TAPCO's invitation to inspect its computer system, especially given that Floyd itself is the one that first requested access to this system.

On appeal, Floyd seeks to frame the issue as "whether the evidence actually before the district court sufficed to allow a rational jury to find in JMFA's favor on JMFA's claim for breach of contract or unjust enrichment." [3] To support this argument, Floyd wrongly claims that "TAPCO did not have an overdraft privilege program in effect before entering into the contract…giving rise to this lawsuit." [4] The record abundantly reflects the fact that *TAPCO had its own overdraft protection program in place well before Floyd came along,* and that Floyd did not give TAPCO the idea of generating revenue by offering its members overdraft protection. R.E.45, 47, 49.

[3] Brief for Appellant at 21.
[4] Brief for Appellant at 21.

Floyd also claims that TAPCO "failed to come forward with any evidence … to establish that the provider of TAPCO's overdraft privilege program [since the parties' Contract terminated] was anyone other than JMFA." [5] However, this assertion simply is not true; TAPCO submitted multiple declarations to the district court to the effect that TAPCO did not utilize any of Floyd's programs, products, or recommendations after December 31, 2007. R.E.122, 135, 139.

Floyd also complains that "TAPCO did not present the contents of its computer system to the district court in seeking summary judgment" and that "TAPCO never in fact allowed anyone from JMFA to touch TAPCO's computer in the absence of any protective order, which never existed in this case." [6] TAPCO cannot "present the contents of its computer system to the district court" because of numerous state and federal privacy laws that prohibit the dissemination or publication of TAPCO's members' personal information. As for Floyd's reference to the protective order that TAPCO required, the order granting TAPCO's motion for summary judgment and the reply declaration filed by TAPCO's attorney (R.E.50-68) make it abundantly clear that TAPCO and its attorney went well out of their way to make TAPCO's computer system available to Floyd in discovery. For instance, TAPCO's attorney drafted the proposed stipulated protective order, at TAPCO's expense. *See* R.E.50. TAPCO's attorney thereafter followed up with

[5] Brief for Appellant at 22.
[6] Brief for Appellant at 23.

Floyd's counsel regarding the entry of the protective order on *three (3) separate occasions*, yet counsel for Floyd never responded to any of these inquiries. R.E.51.

TAPCO believes that Floyd knew full well that TAPCO was not using any of its proprietary information, and that this is the reason why Floyd refused to take TAPCO up on its offer to inspect TAPCO's computer system. TAPCO believes that Floyd's modus operandi, as seen from *John M. Floyd & Associates, Inc. v. First Florida Credit Union*, 443 Fed. Appx. 396, *John M. Floyd & Associates, Inc. v. Star Financial Bank*, 489 F.3d 852, and numerous other federal lawsuits that Floyd has filed, is to do everything in its power to get its unsubstantiated claims to a jury in the hope of obtaining a favorable settlement before trial.

As for Floyd's claims that "TAPCO's continued use of JMFA's Overdraft Privilege program gave rise either to a contract implied-in-fact or a claim for unjust enrichment," [7] and that "whether TAPCO's continued use of JMFA's Overdraft Privilege program gave rise to a contract implied-in-fact or a claim for unjust enrichment because the contract had expired is something for the finder of fact to determine at trial" [8] Floyd again loses sight of the fact that Ninth Circuit law does not enable it to take its claims to the jury when it fails to produce significant and probative evidence in support of these claims in response to a well-founded motion

[7] Brief for Appellant at 25.
[8] Brief for Appellant at 26.

for summary judgment.

There simply is no question that Floyd failed to introduce significant and probative evidence to support its claims that TAPCO used any of its programs after the Contract terminated or approved the use of any of its programs other than the ODP. The district court rightly questioned the validity of Floyd's summary judgment declarations given their lack of foundation, as Floyd's declarants lacked personal knowledge in their assertions that TAPCO continued to use Floyd's products or recommendations after the Contract terminated. Floyd has no one to blame but itself for the district court's ruling given Floyd's refusal to utilize the discovery process in order to assemble significant and probative evidence to support its claims.

Moreover, the Contract itself makes it abundantly clear that TAPCO need not pay Floyd for any recommendations it approved after 24 months of the initial engagement has passed. Again, it is undisputed that the parties' initial engagement terminated no later than August 31, 2004. R.E.122, 138. Thus, even if TAPCO had approved and implemented other recommendations of Floyd's beside the ODP (again, it never did so) TAPCO would not have to pay Floyd if this occurred after August 31, 2006.

Not surprisingly, Floyd has changed its arguments somewhat on appeal, as it now claims to have actionable claims against TAPCO not based on TAPCO's use

of the ODP or e-channels but because "JMFA's Overdraft Privilege program is not primarily a computer program. Rather, JMFA's Overdraft Privilege program consists of a comprehensive set of 'best practices' business methods for offering an overdraft privilege system such that a jury reasonably could have concluded that TAPCO was continuing to use JMFA's system in the absence of any evidence that TAPCO had instead contracted with one of JMFA's competitors to utilize that competitor's overdraft privilege system" [9] Essentially, Floyd is now arguing for the first time on appeal, without any evidentiary support, that TAPCO owes it money because TAPCO is using the "best practices" of "JMFA's system," practices that are neither identified here nor identified before the district court on summary judgment. To the extent this "system" is an overdraft program, it was in place well before Floyd ever came along, and an overdraft program continues after the Contract terminated.

Again, Floyd has incorrectly stated to this Court that "TAPCO did not have *any* overdraft program in effect before entering into the contract with [Floyd]." [10] (Emphasis added). The fact is TAPCO had an overdraft protection program in place well before Floyd came along, and Floyd did not give TAPCO the idea to offer overdraft protection to its members. R.E.45, 47, 49, 91, 100. TAPCO is not liable to Floyd simply because it has been providing its members with overdraft

[9] Brief for Appellant at 11-12.
[10] Brief for Appellant at 10.

protection since the parties' Contract terminated.

Floyd now argues for the first time on appeal that there is a genuine issue of material fact concerning whether TAPCO did or did not originally approve Floyd's recommendation to install the "e-channel" aspect of Floyd's overdraft protection program. [11] Floyd now argues that after TAPCO updated its core processor in late 2007, it was then able to implement the e-channel component of Floyd's overdraft privilege program. Consequently, Floyd now claims that under the Contract, "beginning in December 2007 TAPCO had a 36-month obligation to provide JMFA with JMFA's contractually specified portion of TAPCO's resulting profits from installation of the e-channel component of JMFA's Overdraft Privilege program." [12] However, this argument fails to recognize that even if TAPCO approved the installation of the e-channels (TAPCO vigorously denies it ever approved such, and the parties dispute this issue), the fact is *TAPCO never used Floyd's e-channels, and there is no evidence in the record to the contrary.* R.E.122.

Further, assuming solely for the sake of argument that TAPCO had in fact approved and agreed to "install the e-channel component" of Floyd's program in late 2007, the Contract plainly provides that Floyd need not be paid in such as case, as the approval came outside of 24 months from the initial engagement, which was

[11] Brief for Appellant at 16.
[12] Brief for Appellant at 17.

completed no later than August 31, 2004. [13] R.E.121, 128. Importantly, *Floyd has never contended or provided any evidence to the effect that the "initial engagement" was completed no later than August 31, 2004. See* R.E.85-102.

Floyd tries to make much of the notion that TAPCO did not deny updating its core processing software while alleging that TAPCO did not deny that it "did implement an e-channel component of its overdraft privilege program around the end of 2007." [14] The reality is TAPCO has repeatedly denied it ever used Floyd's e-channels. The fact is TAPCO submitted evidence to the district court to the effect that "other than the ODP, TAPCO did not approve or implement any recommendation made by [Floyd] within 24 months of the parties' initial engagement, which terminated no later than August 31, 2006." R.E.122. As such, the district court did not err by determining TAPCO is not liable to Floyd for the "installation of the e-channel component" of Floyd's program.

Floyd argues "TAPCO's 36-month obligation to pay to JMFA a contingent share of profits generated from the e-channel component [of Floyd's claim] sprung into effect" after TAPCO updated its core processors and "was finally able to implement JMFA's recommendation as to the e-channel component of the Overdraft Privilege program[.]" [15] But this argument fails because Floyd failed to introduce "significant and probative" evidence that TAPCO implemented any e-

[13] Brief for Appellant at 17.
[14] Brief for Appellant at 17.
[15] Brief for Appellant at 18.

channels and because even if it had done so, this implementation of the echannels came after 24 months of the parties' initial engagement, which was August 31, 2006 at the very latest. Hence, the Contract did not require TAPCO to pay for them.

TAPCO provided the district court with ample evidence that other than TAPCO's use of the ODP, TAPCO never used or approved the use of Floyd's e-channels, nor did TAPCO approve or implement any recommendation made by Floyd prior to or after December 31, 2007. Thus, TAPCO provided the district court with ample evidence that other than TAPCO's use of the ODP, TAPCO did not approve or implement any recommendation made by Floyd within 24 months of the parties' initial engagement, which terminated no later than August 31, 2006. R.E.122.

The reality is Floyd never provided to the district court any evidence reflecting that TAPCO used anything other than Floyd's ODP during the term of the Contract. Floyd also failed to produce evidence to the effect that TAPCO approved the use of or used any of Floyd's products or recommendations after the Contract terminated on December 31, 2007, let alone the "significant and probative evidence" that is required to defeat a motion for summary judgment in the Ninth Circuit under *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). Accordingly, the district court correctly dismissed Floyd's claims

on summary judgment.

C. The District Court Did Not Err By Dismissing Floyd's Claim For An Accounting.

The district court properly dismissed Floyd's claim for an accounting, and the fact is this claim cannot properly be reinstated even if this Court reverses the district court's entry of summary judgment as to this claim.

Floyd never had a viable claim for an accounting. The requisites for a cause of action for an accounting are (1) a fiduciary relation existed between the parties, or that the account is so complicated that it cannot be conveniently taken in an action at law; and (2) the plaintiff has demanded an accounting from the defendant and the defendant has refused to render it. *State v. Taylor*, 362 P.2d 247 (Wash. 1961) (quoting *Seattle Nat'l Bank v. Sch. Dist. No. 40*, 55 P. 317 (Wash. 1898)); *Corbin v. Madison*, 529 P.2d 1145 (Wash. App. Ct. 1974).

Floyd and TAPCO never had a fiduciary relationship. Moreover, the subject "account" (*i.e.*, the Contract) is not so complicated that it cannot be conveniently taken in an action at law. As such, the first prerequisite for an accounting was never met.

Similarly, Floyd never satisfied the second prerequisite for an accounting because Floyd never demanded such a thing from TAPCO prior to its initiation of this lawsuit. A demand for an accounting is a necessary prerequisite prior to the commencement of a lawsuit for an accounting. *Taylor*, 362 P.2d 247 (noting

Attorney General's letters to trustees of charitable trust requesting, as to trust, information to be rendered in form excessively burdensome to trustees was not reasonable and proper request for an accounting).

Here, the first that TAPCO ever heard of Floyd's professed desire for an accounting came when TAPCO was served with Floyd's Complaint filed in this case, which is the second lawsuit that Floyd has filed against TAPCO. This claim for an accounting also came after Floyd conducted numerous on site audits of TAPCO's records during the term of the Contract. The fact is that Floyd's claim for an accounting was premature, and Floyd was never able to properly assert such a claim in this action because it failed to demand an accounting from TAPCO before filing suit.

In addition, even if Floyd had been entitled to an accounting, and even if Floyd had made a proper demand for one prior to filing suit, this claim would nevertheless be barred because the statute of limitations ran on this claim long ago.

A cause of action for an accounting is not specifically mentioned in Washington's statutes of limitations. However, RCW 4.16.130, entitled Action for relief not otherwise provided for, provides "[a]n action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued."

If Floyd had a cause of action for an accounting, said cause of action accrued

on January 1, 2008, the day after the Contract terminated. Thus, even if Floyd previously had a claim for an accounting, such claim is now barred by RCW 4.16.130 because Floyd first asserted this claim when it filed this action, some three (3) years after the claim accrued and well after the statute of limitations on this claim expired.

D. The District Court Properly Dismissed Floyd's Claim For Breach Of The Implied Covenant Of Good Faith And Fair Dealing.

As for Floyd's claim for breach of the implied covenant of good faith and fair dealing, as seen from the following, the district court properly disposed of this claim on summary judgment.

The implied covenant of good faith and fair dealing cannot override an express contract provision in the absence of unconscionability or illegality. *E.g.*, *Willis v. Champlain Cable Corporation*, 748 P.2d 621 (Wash. 1988) (*en banc*). No obligation can be implied which would be inconsistent with other terms of the contractual relationship. *Id.* at 626. Courts must give effect to unambiguous contract terms to promote stability, certainty, and fairness in contract enforcement. *Id.*

In a case similar to this, the Ninth Circuit Court of Appeals was presented with a terminable at will employment contract that included a schedule to determine the amount of commissions payable on orders accepted before termination of the contract but delivered thereafter. *Balzer/Wolf Assocs., Inc. v.*

Parlex Corp., 753 F.2d 771 (9th Cir. 1985). A sales representative charged that orders placed after termination resulted from its sales efforts, and that the manufacturer terminated the agreement to avoid paying commissions on orders placed after termination. *Id.* Although the representative was not entitled to any further commissions under the express terms of the agreement, it filed suit against the manufacturer for breach of the implied covenant of good faith and fair dealing. *See id.*

The trial court dismissed the representative's claims on summary judgment, and the Ninth Circuit Court of Appeals affirmed. The Ninth Circuit reasoned that the implied covenant of good faith and fair dealing could not override an express contract provision stating the manner in which commissions would be paid on orders accepted before termination. The *Balzer/Wolff* court further reasoned that enforcing the parties' bargain as struck ensured the implementation of the balance of advantages and disadvantages struck by each party in the bargain they reached. *Id.*

The district court recognized that Floyd's claim for breach of the implied covenant of good faith and fair dealing cannot override the express provisions of the Contract because there is no unconscionability or illegality here. *See, e.g.*, *Willis*, 748 P.2d 621. Further, providing Floyd with an avenue to recover based on this legal theory would not be viable because it would have the effect of implying

an obligation that would be inconsistent with other terms of the parties' contractual relationship as embodied in the Contract. *See id.* at 626. The district court was therefore right to dismiss this claim on summary judgment.

E. Floyd's *Quantum Meruit* Claim Also Fails As A Matter Of Law.

The district court recognized Floyd's *quantum meruit* claim is also fatally infirm. In Washington, a party to a valid express contract is bound by the provisions of that contract, and they may not disregard the same and bring an action for *quantum meruit* relating to the same matter in contravention of the express contract. *U.S. for Use and Benefit of Walton Technology, Inc. v. Weststar Engineering, Inc.*, 290 F.3d 1199, 1204 (9th Cir. 2002) (affirming trial court's dismissal of unjust enrichment claim on summary judgment based on Washington law); *see also Chandler v. Wash. Toll Bridge Auth.*, 137 P.2d 97 (Wash. 1943) (affirming trial court's order sustaining defendant's demurrer that dismissed the case).

Floyd's *quantum meruit* claim falls short of the mark because it arises from the valid, express Contract; for it is abundantly clear from the record that this claim is "relating to the same matter in contravention of the express [C]ontract." Accordingly, this claim fails as a matter of law under *Weststar Engineering* and *Chandler*.

F. The District Court Did Not Abuse Its Discretion By Denying Floyd's Motion To Alter Or Amend Judgment Or, In The Alternative, Motion For Reconsideration.

The denial of a motion to alter or amend a judgment is reviewed for abuse of discretion. *Duarte v. Bardales*, 526 F.3d 563 (9th Cir. 2008). A district court abuses its discretion only if the district court applied an incorrect legal rule in view of the relief requested or made a factual finding that was "illogical, implausible, or without support in inferences that may be drawn from the record." *Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (9th Cir. 2012).

The district court did not abuse its discretion when it denied Floyd's motion to alter or amend judgment or, in the alternative, motion for reconsideration. The reality is Floyd failed to present new facts or legal authority in support of its motion which could not have been brought to the court's attention earlier with reasonable diligence, and Floyd also failed to address why it did not accept TAPCO's invitation to inspect its computer system in order to prove that TAPCO did or did not use Floyd's programs after the parties' contract terminated.

IX. CONCLUSION

Based on the foregoing, this Court should affirm the district court's grant of summary judgment on Floyd's claims on the grounds that Floyd failed to produce significant and probative evidence in support of its charges. The entry of summary judgment may also be affirmed on the grounds that the Contract is completely

integrated or, if nothing else, partially integrated as to its term and payment requirements, and that Floyd is therefore barred from submitting any extrinsic evidence to the contrary.

RESPECTFULLY SUBMITTED this 27th day of August, 2012.

EISENHOWER CARLSON PLLC

By: */s/ Alexander S. Kleinberg*
Alexander S. Kleinberg
Attorney for Appellee/Cross-Appellant
TAPCO Credit Union

X. STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, appellee/cross-appellant TAPCO Credit Union certifies it is not aware of the existence of any related cases.

Dated this 27th day of August, 2012.

/s/ Alexander S. Kleinberg
Alexander S. Kleinberg
Attorney for Appellee/Cross-Appellant
TAPCO Credit Union

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(B)

The undersigned certifies that pursuant to Fed. R. App. P. 32(a)(7)(B), the attached Appellee's Principal and Response Brief complies with the type-volume limitation, and the attached Brief is proportionately spaced, has a typeface of 14 points, and contains 10,146 words.

Dated this 27th day of August, 2012.

/s/ Alexander S. Kleinberg
Alexander S. Kleinberg
Attorney for Appellee/Cross-Appellant
TAPCO Credit Union

CERTIFICATE OF SERVICE

I hereby certify that my office electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 27, 2012. I certify that all participants in the case (as listed below) are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN M. FLOYD AND ASSOCIATES, INC., a Texas corporation,

Plaintiff,

v.

TAPCO CREDIT UNION,

Defendant.

CASE NO. C10-5946BHS

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT OR IN THE ALTERNATIVE MOTION FOR RECONSIDERATION OF JUDGMENT

This matter comes before the Court on Plaintiff John M. Floyd and Associates, Inc.'s ("Floyd") Motion to Alter Judgment Pursuant to Fed. R. Civ. P. 59(e) or in the Alternative Motion for Reconsideration of Judgment (Dkt. 38). The Court has considered the pleading filed in support of the motion and the remainder of the file. For the reasons stated herein, the Court denies the motion.

I. DISCUSSION

On February 8, 2012, the Court granted Defendant TAPCO Credit Union's ("TAPCO") motion for summary judgment (Dkt. 36), and on February 9, 2012, the Court

entered judgment for TAPCO thereby dismissing all claims in the underlying lawsuit. Dkt. 37. On March 8, 2012, Floyd filed the instant motion. Dkt. 38.

The Court denies Floyd's motion. First, although Floyd styles the motion as one to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e), the Court finds that the motion should be treated as one for reconsideration pursuant to Local Civil Rule 7(h). Motions for reconsideration "shall be filed within fourteen days after the order to which it relates is filed." Local Civil Rule 7(h). Here, the Court issued its order granting TAPCO's motion for summary judgment on February 8, 2012. Dkt. 36. Therefore, the deadline to file a motion for reconsideration was no later than February 22, 2012. Because Floyd did not file the instant motion until March 8, 2012, well after the deadline had passed, the motion is untimely. For this reason alone, the Court denies the motion.

Second, even if the motion was timely, the Court denies the motion because Floyd has failed to show "manifest error" in the Court's order granting summary judgment. Local Civil Rule 7(h)(1). Nor has Floyd demonstrated the presence of "new facts or legal authority which could not have been brought to [the Court's] attention earlier with reasonable diligence." *Id.* In the order granting TAPCO summary judgment, the Court noted that Floyd's claims flowed from the principal allegation that TAPCO has failed to pay Floyd for its purported use of Floyd's recommendations, products, and/or services from late 2007 to present. Dkt. 36 at 7. The Court reasoned that, even if the underlying contract permitted Floyd to recover commissions for TAPCO's alleged use of its recommendations post-December 31, 2007 – and, indeed, it was not clear whether or not the contract did so permit – Floyd had still not provided any probative evidence to

support its claim that TAPCO in fact *used* its recommendations, products, and/or services after December 31, 2007. Dkt. 36 at 8.

Having again reviewed the briefing and supporting declarations in connection with the summary judgment motion, the Court confirms its earlier finding that Floyd cannot produce any evidence on this fundamental point. Discovery in this matter closed on November 16, 2011 (Dkt. 18), and, absent some evidence that TAPCO used Floyd's recommendations, products, and/or services after December 31, 2007, Floyd cannot sustain its claims at trial. Indeed, in support of its motion, TAPCO submitted multiple declarations with attachments to assert that it had not used any of Floyd's recommendations, products, and/or services after December 31, 2007. *See* Dkts. 20-24. Part of the reason for this, TAPCO explained, was that Floyd's programs could not run on TAPCO's Windows XP operating system. Dkt. 19 at 11. In the instant motion, Floyd asks the Court to ignore those well-supported declarations and instead focus on TAPCO's purported failure to produce documents that would show how TAPCO allegedly earned in excess of $1 million in additional non-interest income post-December 31, 2007. Dkt. 25 at 6; Dkt. 38 at 6-7.

TAPCO misses the point. Even assuming that TAPCO generated income off overdraft programs after December 31, 2007, Floyd must still show a connection between that income and TAPCO's purported use of Floyd's overdraft programs. In other words, notwithstanding TAPCO's burden on summary judgment, Floyd must still "come forward with sufficiently specific facts from which . . . [the Court can] draw reasonable inferences about other material facts that are necessary elements of the . . . claim." *Triton*

Energy Corp. v. Square D. Co., 68 F.3d 1216, 1221 (9th Cir. 1995); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (Judges are not required "to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party.") (citation omitted). Simply making the conclusory statement, without more, that "TAPCO continues to offer its customers overdraft privilege programs" is not enough. Dkt. 38 at 5. *See* Civil Rule 56(c)(4) (declarations must "set out facts that would be admissible in evidence").

Indeed, much of Floyd's motion appears to rest on the claim that TAPCO has failed to produce certain financial documents, which Floyd claims are necessary to support its claim that TAPCO was using its recommendations, products, and/or services post-December 31, 2007. Dkt. 38 at 4-5. But what Floyd fails to address is why it did not accept an invitation to inspect Floyd's computer system for records that would purportedly demonstrate TAPCO's use of overdraft programs in the relevant time period. Dkt. 28 at 5. If Floyd had concerns that TAPCO was improperly withholding documents or had relevant information in its possession and control, then Floyd should have taken appropriate measures under the civil rules to compel that disclosure. Floyd did not take those steps. At this stage, the Court finds that Floyd cannot avoid summary judgment by merely reasserting the conclusory allegation that TAPCO continues to use its recommendations, services and/or products. Discovery rules exist to prevent precisely the type of scenario that Floyd contemplates here – i.e., a prospective trial based on

unsubstantiated allegations in a complaint and the speculation that certain evidence may exist.[1] For the foregoing reasons, the Court denies the motion.

II. ORDER

Therefore, it is hereby **ORDERED** that Floyd's Motion to Alter Judgment Pursuant to Fed. R. Civ. P. 59(e) or in the Alternative Motion for Reconsideration of Judgment (Dkt. 38) is **DENIED**.

Dated this 21st day of March, 2012

BENJAMIN H. SETTLE
United States District Judge

[1] Floyd questions the Court's failure to note the language in page 3 of the contract that purportedly required TAPCO to provide monthly financial tracking information. Dkt. 38 at 8. As an initial matter, the Court is not required to make arguments for the parties or unilaterally draw favorable inferences from materials that the parties attach to their briefs, but whose significance they fail to explain. Even so, the Court finds that any failure to acknowledge the above-referenced contract language does not constitute "manifest error" as it relates to the Court's dismissal of Floyd's breach of contract and accounting claims. Local Civil Rule 7(h). The Court finds that TAPCO demonstrated through well-founded declarations that Floyd had adequate access to TAPCO's financial information throughout the course of the relationship. For example, TAPCO contended (and Floyd did not dispute) that Floyd sent one of its employees to conduct regular audits of TAPCO's records. Dkt. 19 at 8. Indeed, Floyd does not dispute that TAPCO paid it the full amount due and owing under the contract through December 31, 2007, and, in fact, it appears that Floyd did not raise concern regarding TAPCO's accounting prior to filing the lawsuit. Under these circumstances, the Court finds that it did not err, let alone commit manifest error, in dismissing Floyd's breach of contract and accounting claims.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN M. FLOYD AND ASSOCIATES, INC., a Texas corporation,

Plaintiff,

v.

TAPCO CREDIT UNION,

Defendant.

CASE NO. C10-5946BHS

ORDER GRANTING TAPCO CREDIT UNION'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on TAPCO Credit Union's ("TAPCO") Motion for Summary Judgment (Dkt. 19). The Court has considered the pleadings filed in support of, and in opposition to, the motion and the remainder of the file. For the reasons stated herein, the Court grants the motion.

I. PROCEDURAL HISTORY

On December 29, 2010, Plaintiff John M. Floyd and Associates ("Floyd") filed its complaint against TAPCO. Dkt. 1. On March 24, 2011, TAPCO moved to stay proceedings. Dkt. 6. On May 6, 2011, the Court denied TAPCO's motion. Dkt. 11. On May 17, 2011, TAPCO answered the complaint. Dkt. 12.

On June 28, 2011, the Court issued a minute order setting trial and pretrial dates. Dkt. 16. On September 19, 2011, Floyd moved to extend the deadline to complete discovery. Dkt. 17. On October 17, 2011, the Court granted that motion, thereby extending the discovery cut-off date to November 16, 2011. Dkt. 18.

On November 16, 2011, TAPCO filed the instant motion for summary judgment. Dkt. 19. On December 5, 2011, Floyd responded. Dkt. 25. On December 8, 2011, TAPCO renoted its summary judgment motion to December 23, 2011. Dkt. 26. On December 19, 2011, Floyd filed a (second) revised response to TAPCO's summary judgment motion. Dkt. 27. On December 21, 2011, TAPCO replied. Dkt. 28. On December 23, 2011, Floyd surreplied. Dkt. 33.

II. FACTUAL BACKGROUND

Floyd is a Texas-based consulting firm that specializes in overdraft protection software and software training. Dkt. 19 at 2; Dkt. 25 at 3. Floyd designs, installs, and implements overdraft privilege programs that allow financial institutions to generate additional non-interest income or revenue, for which Floyd is paid a commission. *Id.* at 3. On or about May 5, 2004, Floyd entered into a contract with TAPCO in part to install into TAPCO's computer system its Overdraft Privilege Program Software program ("ODP"), which allowed TAPCO's customers, for a fee, to obtain funds in excess of their account balances, on a short-term basis. *Id.* at 3; Dkt. 19 at 2. This matter involves allegations that TAPCO failed to pay Floyd amounts due and owing under that contract ("Contract").

A. The Contract

Consisting of seven pages, the Contract was drafted as a letter from John M. Floyd, the Regional Director of Floyd, to John Bechtholt, the CEO of TAPCO. Dkt. 20-1 at 2-9. Floyd concedes that it prepared the Contract, but claims that both parties negotiated certain terms therein. Dkt. 25 at 3.

On page 2 of the Contract, under the section titled "Conduct of the Engagement," the parties agreed that the "initial engagement" would take six to eight calendar weeks to complete, "with follow-up lasting for the contractual engagement period." Dkt. 20-1 at 3. The Contract does not define "initial engagement" or otherwise explain what obligations TAPCO agreed to complete during the initial engagement. *See* Dkt. 20-1.

The Contract contemplated a three-year engagement period comprising 36 billing months. *Id.* at 4. For the engagement, TAPCO agreed to pay Floyd twelve percent of its increased monthly non-interest income or revenue resulting from its use of Floyd's recommendations, products, and/or services for overdraft privilege programs. *Id.* To calculate the income for TAPCO's use of the ODP, the Contract provided that "[i]f a recommendation [made by Floyd] is not approved [by TAPCO] it will not be included in the fee calculation. However, if any recommendation, within 24 months of the initial engagement, is installed or approved or approved as modified . . . it will be included in the fee calculation." *Id.* In the event that TAPCO approved any recommendations Floyd made concerning TAPCO's use of products or systems *other* than the ODP, the Contract required TAPCO to pay for such products or systems if the recommendation was approved within 24 months of the initial engagement. *Id.*

B. The Engagement

Floyd installed the ODP and provided training and consulting services to TAPCO. Dkt. 19 at 3; Dkt. 27 at 4. Floyd claims that it provided "recommendations, products and/or services for the implementation of overdraft privilege programs for traditional checking accounts . . . [and] electronic transactions for TAPCO customers, including debit cards, ATMs and Point of Sale transactions." *Id.* Floyd contends that the most valuable aspect of its overdraft privilege programs is its recommendations regarding how a financial institution should implement an overdraft program in accordance with regulatory standards and best industry practices. *Id.*

On October 23, 2007, TAPCO notified Floyd that it did not intend to renew the Contract once it terminated on December 31, 2007. Dkt. 19 at 6. Records indicate that Floyd was well aware of this purported termination date and of TAPCO's intent to only pay Floyd commissions up until that date. *Id.* TAPCO claims that, other than the ODP, it did not approve or implement any recommendation made by Floyd prior to December 31, 2007. *Id.* at 4. Likewise, TAPCO claims that it did not approve or implement any recommendation made by Floyd within 24 months of the parties' initial engagement, as it claims the Contract required for commissions to be due. *Id.* at 5.

Floyd tells a different story. Floyd argues that the only reason TAPCO did not implement many of Floyd's recommendations, products and/or services was because its computer core processing was out of date. Dkt. 27 at 5. Once TAPCO updated its core processors in 2007, Floyd argues that TAPCO used the recommendations post-December 2007 to generate more than $1,000,000 in additional non-interest income, for which

TAPCO has not paid commission. *Id.* Floyd bases this figure on TAPCO's state and federal filings, which it claims show TAPCO's increased non-interest income from December 31, 2007 to present. Id. at 6-7. Floyd contends that TAPCO terminated the Contract and thereafter implemented its overdraft privilege program for electronic transactions in an effort to avoid paying Floyd its twelve percent commission. *Id.* at 6. Moreover, Floyd claims that TAPCO refused to return any of Floyd's products or services after it purportedly terminated the Contract. *Id.*

C. Payment and Accounting

TAPCO paid Floyd $147,583.05 for the engagement through December 31, 2007. Dkt. 19 at 5. TAPCO claims that this amount represents the full payment due for benefits acquired from the ODP software, in accordance with the Contract. Dkt. 19 at 14. Floyd does not dispute that it received this payment or that the amount constitutes full payment for its recommendations, services, and/or products pre-December 31, 2007. Instead, Floyd claims that it is due amounts in connection with TAPCO's purported increased non-interest income or revenue from December 31, 2007 to present, which it believes to be in excess of $1 million. Dkt. 27 at 6-7. With respect to this increase in income or revenue, Floyd claims that it is entitled to TAPCO's financial information, which it claims TAPCO has not provided. Dkt. 1 at 6.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material

fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,

nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

B. Motions to Strike

In its reply, TAPCO moved to strike portions of the declarations of John M. Floyd and Eric Hudgins, submitted in support of Floyd's response. Dkt. 28. Although the Court will not strike entirely the declarations from the record, the Court acknowledges that the Floyd and Hudgins declarations warrant scrutiny for containing statements that arguably lack foundation. The Court will weigh these declarations accordingly.

In its surreply, Floyd also moved to strike TAPCO's entire reply and supporting declarations, claiming that TAPCO improperly raised for the first time certain arguments and evidence on reply. Dkt. 33. In so doing, Floyd does not specify – and the Court will not speculate as to – the evidence and arguments that concern Floyd. Regardless, finding nothing improper about TAPCO's reply, the Court denies Floyd's motion to strike.

C. The Complaint and Issue

Floyd has asserted four claims: (1) breach of contract; (2) unjust enrichment; (3) accounting; and (4) breach of the implied duty of good faith and fair dealing. Dkt. 1. All four claims flow from Floyd's principal allegation that TAPCO has failed to pay Floyd for its use of Floyd's recommendations, products, and/or services from late 2007 to present. *See id.*

D. Breach of Contract

TAPCO makes three arguments with respect to Floyd's breach of contract claim. TAPCO first argues that the Contract is completely integrated and that Floyd cannot

introduce evidence that the contractual term lasted past December 31, 2007, which is when TAPCO claims the Contract terminated. Dkt. 19 at 10. TAPCO next argues that even if the Contract is partially integrated, Floyd may not introduce extrinsic evidence concerning open terms that are inconsistent with the written terms. Dkt. 19 at 11. On that theory, TAPCO asserts that the Contract does not require any payment to Floyd for recommendations that Floyd made after 24 months of the initial engagement. *Id.* Finally, TAPCO argues that "[Floyd] cannot properly introduce significant and probative evidence to the effect that TAPCO is liable to [Floyd] for any ODP charges incurred after the Contract terminated on December 31, 2007." Dkt. 19 at 12.

Finding that the Contract is ambiguous with respect to several terms crucial to the resolution of the allegations contained in the complaint, the Court rejects TAPCO's first two arguments. But, with respect to TAPCO's third argument, the Court agrees that, even if the Contract permitted a recovery of commissions, Floyd has not provided any probative evidence to support its underlying claim that TAPCO used its recommendations, products, and/or services post-December 31, 2007. Absent this evidence, the Court finds that trial is not necessary.

Indeed, in its May 5, 2011 answer to the complaint, TAPCO denied that it generated any income or earnings from its continued use of Floyd's recommendations, products and/or services after the parties' contract terminated on December 31, 2007. Dkt. 12 at 3. Discovery closed on November 16, 2011, and it would appear that Floyd would have generated by now some evidentiary support for its claim. To be sure, it appears that TAPCO afforded Floyd ample opportunity to produce that evidence,

including an invitation to review its computer records for information relating to TAPCO's purported use and reliance upon Floyd's proprietary recommendations post-December 31, 2007. Rather than accept that invitation or otherwise assemble specific probative evidence, Floyd continues to rely in its response on an unsubstantiated allegation regarding its "belie[f] that TAPCO has generated in excess of $1,000,000 in additional non-interest income" post-December 31, 2007. Dkt. 27 at 12. A "belief" that TAPCO increased its earnings – and that those earnings resulted from TAPCO's improper use of Floyd's recommendations – is not evidence. Instead, Floyd must provide "significant and probative" facts to defeat TAPCO's motion, which it has failed to do. *See Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). For these reasons, the Court grants TAPCO's motion with respect to Floyd's contract claim and hereby dismisses that claim.[1]

E. Quantum Meruit

TAPCO next argues that Floyd's quantum meruit claim fails in part because TAPCO has not derived any benefit from Floyd. Dkt. 19 at 13. For the same reasons stated above, the Court grants TAPCO's motion with respect to Floyd's quantum meruit claim. Reading the complaint as a whole, the gist of Floyd's quantum meruit claim is

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[1] In its complaint, Floyd also alleges that TAPCO has breached the Contract by failing to provide its financial information to Floyd, from which Floyd contends it can ascertain TAPCO's use of Floyd's recommendations and calculate the commissions owed. Dkt. 1 at 5. But Floyd does not reference any contractual provision that requires TAPCO to disclose its financial information. Moreover, there is no evidence that Floyd requested such information from TAPCO, nor is there evidence that TAPCO has declined to turn over such information when asked. As a result, the Court denies any breach of contract claim that flows from allegations concerning TAPCO's purported failure to disclose financial information.

that TAPCO unjustly profited from its use of Floyd's recommendations, products, and/or services from December 31, 2007 to present. Dkt. 1 at 7. As noted, the Court finds that Floyd has failed to provide any probative evidence that TAPCO did in fact use and benefit from Floyd's recommendations post-December 31, 2007. TAPCO paid Floyd $147,583.05 for TAPCO's use of the ODP pre-December 31, 2007, and, based on the record, the Court cannot find that this payment constituted anything less than the full payment due and owing to Floyd. Accordingly, the Court dismisses Floyd's quantum meruit claim.

F. Accounting

TAPCO also argues that Floyd has failed to establish a cause of action for accounting because the parties had no fiduciary relationship and Floyd never demanded accounting from TAPCO prior to commencing the lawsuit. *See State v. Taylor*, 58 Wn.2d 252, 262 (1961) (citations omitted). In its response, Floyd failed to address TAPCO's arguments with respect to the accounting claim. Even so, the Court finds that Floyd cannot establish as a matter of law a claim for accounting. TAPCO had no fiduciary, contractual, or other obligation to unilaterally turn over financial information to Floyd, and there is no evidence that Floyd requested, and TAPCO denied, that information. Accordingly, the Court dismisses Floyd's accounting claim.

G. Breach of the Implied Covenant of Good Faith and Fair Dealing

Finally, TAPCO seeks to dismiss Floyd's claim for breach of the implied covenant of good faith and fair dealing. Implied in every contract, the duty of good faith and fair dealing requires parties to cooperate with each other so that each may obtain the full

benefit of performance. *See* 23 WILLISTON ON CONTRACTS § 63:22 (4th ed. May 2011). However, the duty does not require a party to accept an obligation that would be inconsistent with other terms of the parties' contractual relationship. *Id.* Here, notwithstanding the nuances of the Contract, the Court finds that Floyd has failed to produce any evidence that TAPCO's performance was inconsistent with what the Contract required. Floyd does not dispute that it received full payment for TAPCO's use of ODP-related recommendations pre-December 31, 2007, and, as explained above, nothing in the record indicates that TAPCO used Floyd's recommendations post-December 31, 2007. For these reasons, the Court dismisses Floyd's claim for breach of the implied covenant of good faith and fair dealing.

IV. ORDER

Therefore, it is hereby **ORDERED** that TAPCO Credit Union's Motion for Summary Judgment (Dkt. 19) is **GRANTED**. As a result, all claims in the Complaint are hereby **DISMISSED**.

Dated this 8th day of February, 2012

BENJAMIN H. SETTLE
United States District Judge

May 5, 2004

Mr. John Bechtholt
Chief Executive Officer
Tapco Credit Union
6312 19th Street West
Tacoma, Washington 98466

Dear Mr. Bechtholt:

Based on our preliminary analysis, I am submitting this proposal for the engagement of our firm by Tapco Credit Union - Tacoma, Washington. Upon acceptance by Tapco Credit Union, this proposal shall become the Agreement between John M. Floyd & Associates, Inc. and Tapco Credit Union.

Objectives

Our objective is to install our Overdraft Privilege Program in Tapco Credit Union. There will be an emphasis on installing a product that provides a competitive and popular service for your account holders and a significant increase in non-interest income without a significant increase in non-interest expense. Improvement in earnings will come from account holder acceptance and use of this proven product enhancement and accelerated account growth. We will install systems to monitor income streams and associated costs to insure Tapco Credit Union is receiving the appropriate income for the designed product. Accomplishing these objectives will result in an estimated increase in first-year earnings between $208,300 and $271,100. Because we are so confident that this increase is achievable, we offer our service on a contingency basis.

Following is a description of our project deliverables and the terms for the engagement.

Overdraft Privilege Program

1. Perform a comprehensive profile analysis of the demand deposit account holder base to establish Overdraft Privilege limits.

2. At the financial institution's option, we will perform a comprehensive analysis of all other non-interest income and non-labor, non-interest expense and assist in the installation of reasonable operational changes.
   ☑ **Please indicate your selection of this option by checking the box.**

3. Make recommendations, as necessary, regarding deposit agreements to help insure compliance with truth in lending and other regulations.

4. Perform an analysis of Tapco Credit Union's NSF and Overdraft processing and assist Tapco Credit Union in making the necessary changes for an effective Overdraft Privilege Program.

5. Furnish Tapco Credit Union with "camera ready" samples of marketing and advertising material to assure the success of the overdraft privilege product.

6. Provide mailing services for kickoff and quarterly account holder communications, billed separately.

7. Provide all necessary operational and systems/procedures training and materials.

8. Provide sales training and support materials to account holder contact personnel to insure the success of the programs.

9. Assist Tapco Credit Union in the installation of our automated management and collection system that functions with the core application processing system.

Conduct of the Engagement

The initial engagement will require approximately six to eight calendar weeks to complete, with follow-up lasting for the contracted engagement period. Tapco Credit Union also agrees to send the recommended program "kickoff" letter and quarterly "reminder" letters as recommended by John M. Floyd & Associates consultants. Beginning the 3rd month, we will perform follow-up reviews quarterly to insure the success of the program. While the majority of the work will require that we be on-site, certain aspects may be analyzed or handled from our office.

Cost of the Engagement

The cost to your institution for the engagement will be priced using the monthly quantified net increase in non-interest income and expenses related to NSF and overdraft income. Follow-up of the engagement may be extended in twelve-month increments. We would be happy to contract with you using these terms.

Pricing Option	Monthly Billing	Billing Months	Billing Initial
Three Year Engagement	12% of monthly increase in NSF/OD income	36 months	

Due to our strategic alliance with your State League and/or CUNA, we are pleased to offer a 10% discount off of our standard pricing. This discount is included in the price quoted above.

Tapco Credit Union will pay out-of-pocket expenses. At the beginning of the engagement we will invoice Tapco Credit Union a $20,000 fully refundable retainer. After the recommendations have been installed and monitored for not less than sixty (60) days, we will quantify the increased income and Tapco Credit Union agrees to pay monthly the fees, as referenced above. The monthly billings will be first applied against the retainer, and then the remaining payments are to be paid by the 15th of each month. We will invoice semi-monthly for out-of-pocket expenses.

Fees to John M. Floyd & Associates will commence not less than sixty (60) days following the first full month after the installation of recommendations and will continue throughout the contracted engagement period.

Quantification of Earnings

Increases in net NSF and Overdraft income are based on reasonable changes that can be affected on existing income or expenses realized as a result of our recommendations. Increased labor to collect overdrawn Overdraft Privilege accounts and charged off overdrafts associated with the Overdraft Privilege Program will be netted against the increases in NSF and overdraft income or decreases in expenses. Tracking of the increases will begin at the beginning of the month that occurs not less than 60 days after program implementation.

Earnings will be tracked on a line item, by line item basis, utilizing the previous twelve months normalized as a base. Tapco Credit Union agrees to furnish at the beginning of the

initial engagement a list of NSF related areas Tapco Credit Union wishes to exclude from this engagement. Any items not listed on the exclusion list will be considered open for analysis by JMF&A staff and will be added to the quantification of earnings, as applicable. Additionally, the client agrees to provide monthly financial tracking information.

If a recommendation is not approved it will not be included in the fee calculation. However, if any recommendation, within 24 months of the initial engagement, is installed or approved or approved as modified, or initially declined and later approved as recommended or as subsequently modified, it will be included in the fee calculation.

Bear in mind that these projected earnings gains are for the first year only and that much, if not all, of these earnings will carry forward into succeeding years.

We can provide our assistance in a fashion that is both timely and efficient, as well as highly cost effective. The specifics of our proposal, including a description of the approach we will take, are as follows:

Analysis Phase

1. Identify existing account structures and insufficient funds check processing procedures, mode of operation, transaction volume levels, and patterns, etc. currently in use or occurring. This is accomplished through interviews, empirical observation, and review of historical data.

2. At the financial institution's option, we will perform a comprehensive analysis of all other non-interest income and non-labor, non-interest expense and assist in the installation of reasonable operational changes.

Presentation Phase

1. Review with management our recommended changes and the results that can be anticipated. We will identify each recommendation's impact on Tapco Credit Union's compliance, operations, technology, marketing and quality of service.

2. Identify those recommendations that are approved. Formulate a plan and timetable for implementation and designate the individuals from Tapco Credit Union's staff and from our staff who will be responsible for implementation.

3. Meet with the affected parties to review and "sell" the recommendations, which have been approved by management for implementation.

Implementation Phase

1. Coordinate and assist in implementation of all approved recommendations.

2. Insure production and mailing of recommended "kickoff" and quarterly "reminder" letters at Tapco Credit Union's expense.

3. Provide on-site training for all applicable client personnel and assistance with client and accountholder awareness and marketing materials.

4. Install systems to monitor income streams and associated costs to insure Tapco Credit Union is receiving the appropriate income for the designed product.

5. Design and install monitoring and reporting mechanisms in order to chart progress, performance, and results.

Follow-up Phase

1. Meet with management to review the status and results of changes, which have been approved for implementation.

2. Develop and install any adjustments required to "fine-tune" the products we have installed.

3. Perform on-site, quarterly follow-up visits to evaluate and further refine the Overdraft Privilege Program.

Privilege Manager Support

If you choose to install the Privilege Manager CRM™ solution, we will provide support during the contractual period at no charge. After the contractual period, we will provide technical support for $3,000 per year.

John M. Floyd & Associates will provide the initial file layouts to Tapco Credit Union upon completion of the initial installation of the overdraft privilege product. Tapco Credit Union will be responsible for providing John M. Floyd & Associates with new file layouts prior to an upgrade of their core system. We will send an upgrade of the Privilege Manager CRM™ to Tapco Credit Union to be installed at the same time the core upgrade is implemented. The layouts should be provided to us at least four weeks in advance of the installation of the core system upgrade to allow time for John M. Floyd & Associates to upgrade the software interface between the core system and Privilege Manager CRM™. Should the file layouts not be received four weeks in advance of the core upgrade we cannot guarantee completion of the interface changes prior to the system

upgrade. Tapco Credit Union will be responsible for any necessary travel expenses, however none are anticipated.

Out-of-Pocket Expenses

Our goal is to keep out-of-pocket expenses to a minimum. Out-of-pocket expenses consist of reasonable travel expenses, telephone ($1.00 per man-hour expended), copies & supplies ($.75 per man-hour expended), FedEx charges and other unusual expenses. Airline tickets will not exceed coach fares and Tapco Credit Union has the choice of either actual cost or per diem for consultant expenditures.

Employment of Personnel

Each one of our and your employees and contractors has been highly trained at each party's respective expense. Should either party hire one of the other party's employees or contractors on or before one (1) year after the date of completion of the engagement to be performed hereunder, the hiring party will compensate the other party for the loss of such employee in an amount equal to the annual compensation paid by the prior employer to the employee during the one (1) year period immediately preceding the date of employment. The one (1) year period provided for in this paragraph shall be independent and separate of any other restrictive period contained elsewhere in this agreement.

Warranty

John M. Floyd & Associates hereby warrants that its Overdraft Privilege program is compliant with existing credit union state and federal regulations as currently interpreted by regulatory agencies. Further, John M. Floyd & Associates certifies that, to the best of its knowledge, none of its credit union clients have ever received adverse criticism by any regulatory authority on its Overdraft Privilege program. Our Privilege Manager CRM™ is fully compatible with your core processing system.

Confidentiality

The contents of this proposal should be treated as confidential material between John M. Floyd & Associates and Tapco Credit Union. We agree that neither John M. Floyd & Associates nor any of our employees or contractors will use or disclose any data about Tapco Credit Union as a result of this consulting engagement that is not published call report information, without prior written consent from Tapco Credit Union. We understand that we may use the data in our database as long as there is no reference to Tapco Credit Union. Tapco Credit Union agrees that they will not share any recommendations or materials from this study with anyone not affiliated with Tapco Credit Union. If any recommendations or materials or software are shared or adopted either in their original or modified form by other member institutions, companies or affiliated financial institutions of Tapco Credit Union or its holding company, then Tapco

Credit Union agrees to compensate John M. Floyd & Associates on the same terms as stated in this proposal.

We thank you for the opportunity to submit this proposal and look forward to working with you, your staff and your organization. We would like to begin the engagement at your earliest convenience.

Sincerely,

Steve Axtell
Regional Director

John M. Floyd
Chairman
John M. Floyd & Associates
Baytown, Texas

Signature

5/29/04
Date

ACCEPTED BY:
Mr. John Bechtholt
Chief Executive Officer
Tapco Credit Union
Tacoma, Washington

Signature

5.27.04
Date

Upon acceptance, please sign both copies and return to:

John M. Floyd & Associates
125 N. Burnet Drive
Baytown, Texas 77520